82-1865

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WAYNE CARL HAWKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. WAS PETITIONER'S MOTION TO DISMISS FOR UNDUE DELAY ADJUDICATED UNDER THE WRONG FEDERAL RULE OF CRIMINAL PROCEDURE AND IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHTS?

II. IS THERE A SPLIT OF AUTHORITY BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO WHAT CONSTITUTES "WILFUL CAUSATION" OF THE TRANSPORTATION ELEMENT IN 18 U.S.C. §2312?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
Opinions Below	2
Jurisdiction of the Court	2
Constitutional Provisions Involved	2
Statement of Statutes and Regulations Involved	3
Statement of the Case	8
Reasons for Granting the Writ	10
IA. PETITIONER'S MOTION TO DISMISS FOR UNDUE DELAY WAS ADJUDICATED UNDER THE WRONG FEDERAL RULE OF CRIMINAL PROCEDURE. SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.	10
IB. PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WARRANTING THE GRANTING OF HIS MOTION TO DISMISS FOR UNDUE DELAY UNDER THE APPLICABLE CASE LAW OF THIS COURT.	12
II. THERE IS A SPLIT OF AUTHORITY BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO WHAT CONSTITUTES "WILLFUL CAUSATION" OF THE TRANSPORTATION ELEMENT CONTAINED IN 18 U.S.C. §2312.	13

TABLE OF CONTENTS—*(Continued)*

Page

Appendix A A-1
Appendix B A-3
Appendix C A-5
Appendix D A-6
Appendix E A-8

TABLE OF AUTHORITIES

Cases Page

Pereira v. United States, 347 U.S. 1, (1954) .. 14, 16

United States v. Berlin, 472 F.2d 13 (9th Cir., 1973) 15, 16

United States v. Bloom, 78 F.R.D. 591 (E.D. Pa., 1977) 11

United States v. Lovasco, 431 U.S. 783 (1977) . 12, 13

United States v. Marion, 404 U.S. 307 (1971) . 11, 12, 13

United States v. Maze, 414 U.S. 895 (1974) 16

United States v. White, 446 F.2d 1280 (3rd Cir., 1971) 11

STATUTES

United States Constitution, Amendment Five

18 U.S.C. §2(b) 3, 14, 15, 16

18 U.S.C. §2312 ..... 3, 8, 14, 15

28 U.S.C. §1254 2

OTHER AUTHORITIES

Federal Rules of Criminal Procedure: (F.R.Cr.P.)

Rule 12(b) 3, 10, 11

Rule 48(b) 4, 10, 11

Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases for the United States District Court for the District of Delaware (known as the Local Rules):

Rule 5 ..... 4, 5, 10

8 *Moore's Federal Practice:*

¶12.02[1] 10, 11

¶12.03[2] 10, 11

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WAYNE CARL HAWKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, WAYNE CARL HAWKINS, prays that a Writ of Certiorari issue to review judgment order of the United States Court of Appeals for the Third Circuit, entered February 22, 1983, and order denying sur petition for rehearing, entered March 17, 1983, in *United States of America v. Wayne Carl Hawkins*, No. 82-1312, both of which are unreported.

OPINIONS BELOW

The judgment order of the United States Circuit Court of Appeals for the Third Circuit, in the case of *United States of America v. Wayne Carl Hawkins*, No. 82-1312, dated February 22, 1983, is unreported and is reproduced in the Appendix at p. A-1. The order denying sur petition for rehearing, dated March 17, 1983, is unreported and is reproduced in the Appendix at p. A-3.

JURISDICTION OF THE COURT

On January 26, 1982, petitioner Wayne Carl Hawkins, was found guilty by a jury in the United States District Court for the District of Delaware of Counts I and II of the indictment handed down in Criminal Action No. 81-26. On April 22, 1982, the Honorable Edwin D. Steel, Jr., Senior Judge, handed down an opinion and order denying petitioner's motions for judgment of acquittal, arrest of judgment and for a new trial. On April 30, 1982, judgment was entered and sentence imposed by Judge Steel.

On February 22, 1983, the United States Circuit Court of Appeal for the Third Circuit affirmed the judgment of the District Court and on March 17, 1983, denied petitioner's sur petition for rehearing.

The jurisdiction of the Supreme Court of the United States to hear this petition is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment Five:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the

land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF STATUTES AND REGULATIONS INVOLVED

The following Federal Statutes are involved in this case: 18 U.S.C. §2(b) and 18 U.S.C. §2312.

18 U.S.C. §2 (b):
"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

18 U.S.C. §2312:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The following regulations are involved in this case: Federal Rules of Criminal Procedure, Rule 12(b) and Rule 48(b); and United States District Court, District of Delaware, Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases, Rule 5.

F.R.Cr.P., Rule 12 (b):
(b) PRETRIAL MOTIONS. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by

motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

F.R.Cr.P., Rule 48(b):

(b) BY COURT. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

United States District Court, District of Delaware, Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases, Rule 5:

5. *Time Within Which Motions Must be Filed.*

(a) *Time Limits.* Unless otherwise ordered by the Court at the time of arraignment, the following motions shall be filed on or before the tenth day following arraignment:

(1) Motions under F.R.Cr.P. 7(f) for a bill of particulars.

(2) Motions under F.R.Cr.P. 12(b) raising defenses or objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the Court or to charge an offense.

(3) Motions under F.R.Cr.P. 14 for relief from prejudicial joinder.

(4) Motions under F.R.Cr.P.15 for permission to take a deposition.

(5) Motions under F.R.Cr.P. 16(a) and (b) for discovery.

(6) Motions under F.R.Cr.P. 21 for transfer from the District for trial.

(7) Motions to suppress evidence.

(8) Motions under F.R.Cr.P. 12(d) (2) for notice of the government's intention to use evidence, such motions to be accompanied by a motion to suppress under sub-paragraph (7) thereof.

(9) Demands under F.R.Cr.P. 12.1(a) for notice of the defendant's intention to offer a defense of alibi.

(10) Demands for disclosure of the interception of any wire or oral communication, and demands for disclosure of the contents of the intercepted communication or evidence derived therefrom, including demands under 18 U.S.C. §§2518(8) (d), 2518(10) (a).

(b) *Sanction.* Failure by a party to raise defenses or objections or to make requests within the time limit provided in paragraph (a) hereof shall constitute waiver thereof, but the Court may grant relief from the waiver if it determines that:

(1) Opportunity to make the motion or request did not therefore exist.

(2) Neither the defendant nor his counsel was aware of the grounds for such motion within the time permitted for its filing under subsection (a), or

(3) Under all the circumstances, justice otherwise requires.

(c) *Notice of Defense Based Upon Mental Condition.* If a defendant intends to rely upon the defense of

insanity at the time of the alleged crime, or if a defendant intends to introduce expert testimony relating to a mental disease, defect or other condition bearing on the issue of whether he had the mental state required for the offense charged, he shall so notify the attorney for the government in writing and file a copy of such notice with the clerk on or before the tenth day following arraignment, unless otherwise ordered by the Court at the time of arraignment. If there is a failure to comply with the requirements of this paragraph, such defense of insanity may not be raised and such expert testimony may be excluded, but the Court may for cause shown allow late filing of the notice, or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(d) *Related Procedures.*

(1) Motions requiring affidavit support shall be accompanied at the time of their filing with such support. Where an evidentiary hearing is to be requested, the motion shall include such a request.

(2) Counsel seeking discovery under F.R.Cr.P. 7(f) or 16(a) or (b) shall prepare a written motion and shall confer, before its filing, with opposing counsel in a good faith effort to secure the discovery sought. If fully satisfied with any voluntary response, the attorney seeking discovery shall perfect the record by filing the motion along with a certificate stating that there has been voluntary compliance, specifying any items produced for inspection, and stating that nothing remains for judicial determination. Such a filing will not result in any excludable time under Section 10 hereof. If counsel seeking discovery is not fully satisfied after consultation with opposing counsel, the former shall file the motion along with a certificate which states that he has conferred as required by this rule, which specifies any items produced for inspection,

and which states the matters that remain for judicial resolution. The Clerk will not accept for filing any motion seeking discovery under these rules which is not accompanied by a certificate which complies with the provisions of this Section.

(3) Two copies of all motions, supporting affidavits and the certificate required by Section 5(d) (2) hereof shall be filed with the Clerk.

(4) Motions determined by the Court not to require an evidentiary hearing shall be set for oral argument promptly. Oral argument whenever feasible shall be held within ten days of the filing of such motions. Written briefs shall not be required unless the Court so orders following the filing of the motion or at oral argument. Counsel shall be prepared at argument, however, to refer the Court to any relevant authority.

(5) Motions determined by the Court to require an evidentiary hearing shall be set for hearing and argument promptly. Briefing, if required, shall be in accordance with a schedule approved by the Court.

STATEMENT OF THE CASE

On May 29, 1981, the Grand Jury for the District of Delaware returned an indictment against petitioner charging seven violations of 18 U.S.C. §2312, hence the basis for federal jurisdiction in the court of first instance. Petitioner was arraigned on July 15, 1981, and pleaded not guilty. At that time, petitioner was represented by Emmett Conte, Esquire. On September 24, 1981, Mr. Conte was granted leave to withdraw as counsel for petitioner. On November 20, 1981, John C. Phillips, Jr., Esquire, entered an appearance on behalf of petitioner. On December 22, 1981, Mr. Phillips filed a motion to dismiss Counts I and II of the indictment for undue delay. On December 29, 1981, petitioner's motion to dismiss was denied as untimely under Rule 5(a) of the District of Delaware's Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases (herein referred to as Local Rules) [pp. 4 to 7 *infra.*]. A jury trial was held in the Federal Court for the District of Delaware and petitioner was found guilty of Counts I and II of the indictment.

Counts I and II of the indictment alleged interstate transportation of two stolen Catapillar Traxcavators. The vehicle involved in Count I was alleged to have been transported "on or about November 1, 1976," while the vehicle involved in Count II was alleged to have been transported "on or about March 1, 1977." Counts I and II were initially presented to the Grand Jury for the District of Delaware in June of 1977. At that time, the Grand Jury refused to return an indictment against petitioner. These counts were then resubmitted to the Grand Jury for the district of Delaware in May of 1981 in conjunction with the five other counts which were returned in the indictment against the petitioner. No new evidence regarding Counts I and II was presented to the May 1981 Grand Jury that had not been presented to the June 1977 Grand Jury.

The two Catapillar Traxcavators involved in Counts I and II were sold on two separate occasions to Joseph Scerbo who testified that the prices paid for these two pieces of equipment were fair and reasonable and that during these transactions, petitioner had stated that he was acting as a broker for John Symington. Scerbo further testified that in both instances he made immediate resale to two separate purchasers. Finally, Scerbo testified that these subsequent purchasers in turn made arrangements with interstate carriers to pick up the respective Traxcavators and transport them to the ultimate purchaser's place of business. Although the Government produced evidence that the vehicles in question had been stolen, it did not prove that petitioner had knowledge of that fact.

During trial, petitioner called John Hemphill as a witness. Hemphill testified that he knew petitioner because Hemphill had been involved in the sale by John Symington of the two Traxcavators involved in Counts I and II. Hemphill explained that John Symington had been an alias used by several co-conspirators who were stealing earth moving equipment and selling it to or through unknowing people such as petitioner. The trial Court denied petitioner's post-trial motions for relief. The trial Court's rulings on petitioner's pretrial and post-trial motions for relief were upheld by the Third Circuit Court of Appeals by order dated February 22, 1983. Petitioner now petitions this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

IA. PETITIONER'S MOTION TO DISMISS FOR UNDUE DELAY WAS ADJUDICATED UNDER THE WRONG FEDERAL RULE OF CRIMINAL PROCEDURE. SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

On December 22, 1981, petitioner filed a motion to dismiss Counts I and II for undue delay. On December 29, 1981, the trial Court denied the motions on the basis that defendant had failed to comply with the time limitation of Local Rule 5 [pp. 4 to 7 *infra*]. Subsection (a) of Local Rule 5 specifically enumerates motions which must be filed within ten days of the date of arraignment. The enumeration does not include motions to dismiss for undue delay. The only itemized motion which might include undue delay motions is Local Rule 5(a)(2), i.e., motions under F.R.Cr.P. 12(b) [p. 4 *infra*]. However, a review of subsection (b) of Rule 12 reveals that motions to dismiss for undue delay are *not* within the purview of Rule 12(b). See also 8 *Moore's Federal Practice*, §12.03[2]. Local Rule 5(a)(2) does nothing more than establish a time limitation for the presentation of motions contemplated under F.R.Cr.P. 12(b). Since motions to dimiss for undue delay are not covered by F.R.Cr.P. 12(b) or any other subparagraph of Local Rule 5(a), such motions are not subject to the ten day limitation imposed by Local Rule 5(a).

Petitioner asserts that his motions for dismissal because of undue delay are governed by F.R.Cr.P. 48(b) [p. 4, *infra*], since the Government sought a bill of indictment in 1977. As Professor Moore states in his treatise:

> "Motions raising defensive matter cognizable under Rule 48(b) (dismissal) for lack of speedy trial or for

failure to prosecute would still appear to operate independently of Rule 12." 8 *Moore's Federal Practice*, §12.02[1].

Rule 48 does not contain any time limitation as to when such motions are to be filed. Nor do the local rules place any time limitation upon motions pursuant to Rule 48. Thus, motions pursuant to Rule 48(b) are *not* covered by Rule 12(b) and are not subject to local rules adopted pursuant to Rule 12(c). The foregoing analysis of F.R.Cr.P. 12(b) and 48(b) and of Local Rule 5(a) is in accord with *United States v. White*, 446 F.2d 1280 (3rd Cir., 1971).

Moreover, it should also be noted that a ten day time limitation was never contemplated as being applicable to motions for undue delay. 8 *Moore's Federal Practice*, §12.02[1] and §12.03[2] make it clear that only those defects in the indictment which are noticeable on the face of the indictment must be raised before trail under Rule 12. See also *United States v. Bloom*, 78 F.R.D. 591 (E.D. Pa., 1977). Similarly, the Court's language in *United States v. Marion*, 404 U.S. 307 (1971) makes it clear that undue delay due process violations may be considered before, during and after trial. The foregoing clearly indicates that the Circuit Court erred in upholding the application of the ten day limitation to defendant's pretrial motion to dismiss for undue delay.

Therefore, petitioner argues that his motion to dismiss Counts I and II for undue delay was filed in a timely manner and that the issues raised therein were never properly considered on the merits by the trial Court. The Third Circuit's approval of the trial Court's erroneous ruling is such a departure from the accepted and usual course of judicial proceedings as to warrant the granting of this petition so as to allow this Court to exercise its power of supervision.

IB. PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WARRANTING THE GRANTING OF HIS MOTION TO DISMISS FOR UNDUE DELAY UNDER THE APPLICABLE CASE LAW OF THIS COURT.

Petitioner argues that the delay between the time of the offenses alleged in Counts I and II and the time of the indictment violated his due process rights under the Fifth Amendment of the United States Constitution. See *United States v. Marion*, 404 U.S. 307 (1971); *United States v. Lovasco*, 431 U.S. 738 (1977). The three crucial factors to be considered are: (1) the length of the delay, (2) the reason for the delay, and (3) the actual prejudice caused to the defendant.

The length of the delay between the time of the alleged offenses (November 1, 1976 and March 1, 1977) and the time of indictment (May 29, 1981) is obviously considerable. The delay in Count I was four years and seven months while the delay in Count II was four years and three months. Moreover, the Government offered no reason for the delay, because it had no valid reason for such a delay. The fact that the Government presented a bill of indictment against the defendant alleging the very same crimes in June of 1977 indicates that the Government was aware of defendant's alleged involvement for four years before an indictment was eventually obtained. Thus, this is not a case in which defendant's alleged involvement in the crimes was unknown to the Government until shortly before the indictment was obtained. Nor is this a case where the intervening four years was required by the Government so as to complete further extensive investigation to supply the Grand Jury with adequate information upon which to indict. In fact, no new information was presented to the second Grand Jury in May of 1981.

The inordinate, unreasonable, four and one half year delay caused substantial prejudice to the defendant

in his efforts to defend Counts I and II. John Hemphill testified he was one of a group of conspirators who perpetrated a fraud on defendant under the name of John Symington. Hemphill's knowledge of the Symington conspiracy was only revealed to defendant shortly before trial. At that time, Hemphill refused to reveal the true identity of the "John Symington" who dealt with defendant. As a consequence, it was impossible for defendant to locate and produce the most crucial witness in the trial. Without prior knowledge of the true identity of the John Symington for whom he acted as broker in the sales to Joseph Scerbo, it is unreasonable to expect petitioner to keep track of that person for over four years. This is particularly true since that person's entire objective was to perpetrate a fraud on petitioner and then vanish.

Similarly, defendant could not locate and produce his business partner at the time of the offenses alleged in Counts I and II who had knowledge of defendant's dealings with John Symington. The passage of time also clouded the memories of other defense witnesses who had contact with "John Symington". Although these defense witnesses had vague recollections of a John Symington, it was impossible for them to be precise enough in their testimony to truly assist defendant.

The standard enunciated in *United States v. Marion*, *supra*, and *United States v. Lovasco*, *supra*, was clearly met and petitioner established a violation of his Fifth Amendment due process rights. Therefore, this petition should be granted.

II. THERE IS A SPLIT OF AUTHORITY BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO WHAT CONSTITUTES "WILLFUL CAUSATION" OF THE TRANSPORTATION ELEMENT CONTAINED IN 18 U.S.C. §2312.

In upholding the trial court's ruling, the third circuit has created a split of authority between the circuits

as to what constitutes willful causation under the statutory language of 18 U.S.C. §2312 "caused to be transported". The evidence presented to the jury indicated that the two vehicles involved were purchased by Joseph Scerbo who, in both instances, made immediate resales to two separate purchasers. These subsequent purchasers in turn made arrangements with interstate carriers to pick up the respective bulldozers and transport them to the ultimate purchaser's place of business. The trial Court charged the jury in accordance with 18 U.S.C. §2(b) that:

> "Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

In denying petitioner's posttrial motion for judgment of acquittal, the trial Court quoted the following language of the United States Supreme Court in *Pereira v. United States*, 347 U.S. 1, 8 (1954):

> " 'Where one does an act with knowledge [that certain circumstances] will follow in the ordinary course of business, or where [such consequences] *can reasonably be foreseen*, even though not actually intended,' then one has caused such consequences within the meaning of §2(b)." [Emphasis added.]

In the present case the Government argued the petitioner's culpability under §2(b) in that by each sale to Scerbo defendant caused Scerbo (an innocent party) to sell the bulldozers to another innocent party (subsequent purchaser) who in turn caused a third innocent party (interstate carrier) to transport the respective bulldozers in interstate commerce. On the basis of these attenuated facts, petitioner was held to have violated 18 U.S.C. §2312 as to Counts I and II. There does not appear to be any previous case in which such a tenuous

connection between a defendant and the eventual transportation in interstate commerce has ever been found to constitute a violation of §2312.

The case most closely on point is *United States v. Berlin*, 472 F.2d 13 (9th Cir., 1973), which involved a complicated auto theft conspiracy. Members of the conspiracy in Los Angeles would sell automobiles to purchasers in that city with delivery to be made in New York City. Subsequent to each sale the conspirators in New York City would steal a car meeting the specifications for that sale. Each purchaser then made a down payment in Los Angeles and flew to New York where he received the stolen car and false papers for it in exchange for the balance of the purchase price. The car was then driven by the "innocent" purchaser back to Los Angeles.

The prosecution in *Berlin* made the following contention:

> "Sale of a car [known by the seller to be stolen] followed by interstate transportation by an innocent purchaser constitutes a violation of the Dyer Act by the seller where the interstate transportation is reasonably *foreseeable*." *Id.* at 14. [Emphasis added.]

This, in effect, is the contention made by the Government in this case and accepted by the trial Court. The Court of Appeals in *Berlin* rejected this interpretation of the Dyer Act stating:

> "We agree with the appellants that this rule is too broad. Since interstate automobile transportation is now commonplace, this construction would seem to render every sale of a stolen car a federal offense. *Section 2(b)* does, as appellants contend, have overtones of agency, and, in our judgment, the *wilful causation to which it refers must be purposeful rather than be based simply upon reasonable foreseeability*." *Id.* at 14. [Emphasis added.]

The Court of Appeals in *Berlin*, however, found that the defendants had violated the statute since:

> "The interstate transportation was not fortuitous; it was carefully planned and was an integral part of the total scheme . . . the desired interstate transportation was assured by the manner in which the purchasers were selected." *Id.* at 15.

In the present case, there was no proof that petitioner knew the vehicles were stolen. Moreover, the interstate transportation subsequent to the sales to Scerbo was not planned by petitioner and was, in fact, nothing more than fortuitous. Scerbo was free to resell when and to whom he wished. Indeed, he could have sold to purchasers who would not have moved the equipment interstate at all. Thus, the necessary, purposeful, willful causation found in *Berlin* is not present herein.

Moreover, the trial Court's reliance on the *Pereira* decision is questionable in light of the Court's subsequent decision in *United States v. Maze*, 414 U.S. 395 (1974). *Maze* distinguished the prior holding in *Pereira*, in essence ruling that it was necessary to show a purposeful, intentional act as a part of defendant's scheme in order to obtain a conviction. This distinction is essentially the distinction recognized by the *Berlin* Court, causing that Court to reject the Government's broad interpretation of 18 U.S.C. §2(b). This distinction is crucial to the case at hand where there was no showing by the Government that transportation of the vehicles in interstate commerce was anything other than a fortuitous occurrence, as opposed to an event willfully caused by petitioner as a part of this scheme. Thus, under the *Berlin* and *Maze* rationale, the Government failed to sustain its burden of proof. The Third Circuit's acceptance of the trial Court's ruling in the case at hand creates a split of authority between the Third Circuit and the

Ninth Circuit which should be resolved by this Court. Therefore, this petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1312

UNITED STATES OF AMERICA

v.

WAYNE CARL HAWKINS,

Appellant

(D.C. Criminal No. 81-00026-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued: February 18, 1983
Before: GIBBONS, HUNTER AND ROSENN,
Circuit Judges

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231 Delaware Trust Building
Wilmington, Delaware 19801
Attorney for Appellant

JOSEPH J. FARNAN, JR.
United States Attorney

WILLIAM C. CARPENTER, JR.
Assistant U.S. Attorney
Attorneys for Appellee

JUDGMENT ORDER

Wayne C. Hawkins appeals from a judgment of sentence imposed following his conviction on two counts of violation of 18 U.S.C. §2312. He contends:

(1) that the trial court erred in denying his motions to dismiss the indictment for undue delay between the offense and the indictment;

(2) that venue in Delaware on Count I was improper;

(3) that the court erred in denying his severance motion;

(4) that the court erred in denying his motion to withdraw from a stipulation;

(5) that the court erred in denying his motion to suppress evidence seized at the Doeskin plant;

(6) that there was insufficient evidence respecting transportation in interstate commerce; and

(7) that the court erred in excluding witness Hemphill's testimony about statements against penal interest by John Hardin.

We find no merit in these contentions.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

BY THE COURT,

JOHN J. GIBBONS
Circuit Judge

Attest:

SALLY MRVOS
Sally Mrvos, Clerk

Dated: February 22, 1983

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1312

UNITED STATES OF AMERICA

v.

WAYNE CARL HAWKINS,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: March 17, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, *Plaintiff,*	:	
v.	:	Criminal Action
WAYNE CARL HAWKINS, *Defendant.*	:	No. 81-26

ORDER

AND NOW, TO WIT, this 22nd day of April, 1982, the court having considered the motions of the defendant for a judgment of acquittal, an arrest of judgment, and for a new trial, and the briefs having been filed in connection therewith,

IT IS ORDERED that each of the motions is denied.

_____

J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, *Plaintiff,*	:	
v.	:	Criminal Action
WAYNE CARL HAWKINS, *Defendant.*	:	No. 81-26

ORDER

AND NOW, TO WIT, this 27th day of April, 1982, it appearing to the Court that through an inadvertence statements were made in the opinion filed on April 22, 1982, which should be corrected as follows:

1. The first two lines on page 7 which read:

> "Constitution, especially since a bill of indictment for the same crimes had been filed as early as June, 1977. In *United States*"

should be stricken and the following inserted in lieu thereof:

> "Constitution, especially since a hearing had taken place before the Grand Jury for the same crimes in June of 1977. In *United States;*"

2. The fifth line on page 8 which reads:

> "97). Defendant had known since he was indicted in 1977 that the"

should be stricken and the following inserted in lieu thereof:

> "97). Defendant has known since he was before the Grand Jury in 1977 that the"

IT IS, THEREFORE, ORDERED that the Clerk shall change the opinion of April 22, 1982, so that, as changed, it will conform to the above.

_____

J.

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United States District Court for

ited States of America vs.

DISTRICT OF DELAWARE

DEFENDANT: WAYNE CARL HAWKINS

DOCKET NO.: CR. 81-26

(120)

APPENDIX E

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH April DAY 30 YEAR 1982

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL JOHN C. PHILLIPS, JR., ESQUIRE
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of: Count I - causing to be transported in interstate commerce a stolen motor vehicle, that is, a Caterpillar 955 Traxcavator, true Serial No. 85J5647, altered Serial No. 85J6256, from the State and District of Delaware to the State of New Jersey, and knowing the motor vehicle to have been stolen, all in violation of T18 USC, §2312. Count II - causing to be transported in interstate commerce a stolen motor vehicle, that is, a Caterpillar 955 Traxcavator, true Serial No. 85J10209, altered Serial No. 85J10156, from the State and District of Delaware to the State of Missouri, knowing the motor vehicle to have been stolen, all in violation of T18, USC §2312.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant was committed to the custody of the Attorney General for a period of

SENTENCE OR PROBATION ORDER

IT IS ADJUDGED that the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 4 years on Count I.

Imposition of sentence on Count II is hereby suspended and defendant is placed on probation for a period of 4 years. Such period of probation to be consecutive to the term of imprisonment imposed on Count I or is to commence upon the defendant's release from prison by the U. S. Parole Commission under the following terms and conditions:

SPECIAL CONDITIONS OF PROBATION

1. that he comply with all laws of the local, state and federal governments,
2. that he obey the rules and regulations of the Probation Office.

FILED
APR 30 1982
CLERK, U.S. DISTRICT COURT
DISTRICT OF DELAWARE

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Edwin D. Steel, Jr.

Date 4/30/82